

THE IMPACT OF ADVANCE MEDICAL DIRECTIVES ON DISTRIBUTION OF ESTATE ASSETS UNDER THE SIMULTANEOUS DEATH ACT

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An agent acting under the authority of an advance medical directive may have the authority to alter the patient's time of death by continuing or withdrawing life-sustaining treatment. The exact moment of death is critical when the deaths of testator and beneficiary occur close in time. To take under a will or intestacy, the beneficiary must survive the testator by a prescribed period of time. This leaves the agent with tremendous power to affect probate and nonprobate asset distribution. In their article, Dr. James Benson and Probate Judge Russell Austin discuss the potential conflict of interest for agents and the potential impact of advance medical directives on estate plans, and offer recommendations to resolve the issues.

By statute, advance medical directives now place health care agents in the position to alter the time of death of a patient by withholding or removing life-sustaining medical treatment. The specific timing of the moment of death becomes critical in cases in which the deaths of two parties, related as testator and beneficiary,

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occur in close succession. Following the death of a testator, a patient named as the beneficiary must survive the testator by a prescribed period of time in order to qualify legally as a beneficiary under the survival or simultaneous death provisions of an existing estate plan or as an heir under the law of inheritance. Therefore, the health care agent who regulates the time of death and thus the survival period of the beneficiary patient possesses tremendous power to affect the estate distributions of both probate and nonprobate assets. This article discusses the often unanticipated potential impact of advance medical directives on estate plans, recognizes the possible conflict of interest for agents, and develops several recommendations for resolving these issues.

I. Introduction to Advance Directives

Each state has enacted some form of "advance medical directive" statute that permits their citizenry to execute what are commonly referred to as "living wills" and "durable powers of attorney for health care."¹ In general, the purpose of these documents is to allow individuals to give advance instructions regarding their future medical care in the event they become unable to speak for themselves due to illness, injury, or incapacity. Both directives permit surrogate health care decision making by an agent whose appointment and authority is regulated by state statute. Although the medical conditions that trigger the application of these directives and the agent's power thereunder are regulated by statute, the timing of the use of the agent's authority rests solely with the agent. Should the patient reside in a state that has adopted a "survival statute" that mandates a minimum period of survival in order to take as an heir or beneficiary, any decision by the agent to withhold or withdraw life-sustaining medical treatment can have an adverse impact on the patient's estate plan. This article addresses the relationship between advance directives and survival statutes, and the possible estate planning consequences of the untimely use of an advance directive. Texas's advance directives and survival statute will be drawn upon as examples for this analysis.

1. See Colleen M. O'Conner, *State Health Decisions Legislative Update: 1995 Annual Summary*, BIOETHICS BULL. (American Bar Ass'n Coordinating Group on Bioethics and the Law, Chicago, Ill.), Summer/Fall 1995, at 18-33.

A. The Texas Natural Death Act

The Natural Death Act² permits a competent adult (referred to as a “declarant”) to execute a written “Directive to Physicians” commonly known as a “Living Will.” This directive is a record of the declarant’s instructions as to the use of life-sustaining medical treatment. Declarants may adopt the sample medical directive set forth in the Natural Death Act³ as a statement of their own wishes regarding the use of life-sustaining medical treatment, or they may include directive directions other than provided by statute.⁴

Before the medical directive may be implemented, the declarant must meet the two requirements of a “qualified patient”: the declarant must be diagnosed by two physicians as having a “terminal condition”⁵ and death must be imminent or will result within a relatively short time without the application of those life-sustaining procedures.⁶ This diagnosis must be certified in writing by the qualified patient’s attending physician and one other physician who has personally examined the patient.⁷

Once a qualified patient can no longer make his or her own treatment decisions because he or she is comatose, incompetent, or otherwise mentally or physically incapable of communication,⁸ health care decisions may be made by the qualified patient’s attending physician⁹ or by a person chosen by the qualified patient as his or her “designated person.” The attending physician and the designated person may make a treatment decision to withhold or withdraw life-sustaining procedures from the qualified patient.¹⁰ Although the Act

2. TEX. HEALTH & SAFETY CODE ANN. §§ 672.001-.021 (West 1992 & Supp. 1997).

3. *See id.* § 672.004.

4. *See id.* § 672.003(d).

5. “‘Terminal Condition’ [is defined] . . . as an incurable or irreversible condition caused by injury, disease, or illness that would produce death without the application of life-sustaining procedures, according to reasonable medical judgment, and in which the application of life-sustaining procedures serves only to postpone the moment of the patient’s death.” *Id.* § 672.002(9).

6. *See id.* §§ 672.010(a), .010(b)(1), .010(b)(2).

7. *See id.* § 672.002(8).

8. *See id.* § 672.008(a).

9. *See id.* § 672.008(c).

10. *See id.* § 672.008(b). “Life-sustaining procedure” is defined as:

a medical procedure or intervention that uses mechanical or other artificial means to sustain, restore, or supplant a vital function, and only artificially postpones the moment of death of a patient in a terminal condition whose death is imminent or will result within a relatively short time without the application of the procedure. The term does not include the administration of medication or the performance of a

does not specifically refer to the designated person as the patient's agent, such a grant of authority would appear to create an agency relationship.

B. The Durable Power of Attorney for Health Care

Like the Natural Death Act, The Durable Power of Attorney for Health Care Act¹¹ provides for surrogate health care decision making. The Health Care Act permits a person referred to as the "principal" to appoint an agent, known as a "health care agent." Once appointed, this agent has the authority to make health care decisions on behalf of the principal,¹² including those decisions pertaining to the use of life-sustaining medical treatment. The agent does not have the authority to act until the principal's attending physician certifies in writing and files the certification in the principal's medical record that the principal lacks the capacity to make health care decisions.¹³ Thereafter, treatment decisions may be made by the agent in accordance with the principal's written instructions and the agent's knowledge of the principal's wishes, including the principal's religious and moral beliefs, if known.¹⁴ If not known, the agent is to act in accordance with the agent's assessment of the principal's best interest.¹⁵

II. The Relationship Between Advance Directives, Simultaneous Death Acts, and Estate Plans

The authority given to designated persons and health care agents to withhold or withdraw life-sustaining medical treatment places these agents in a position to alter the passive moment of death of the patient. For the terminally ill patient on life support, the withdrawal of any singular system of life support may lead to death within minutes.¹⁶ Should this patient be a named beneficiary of an

medical procedure considered to be necessary to provide comfort or care or to alleviate pain.

Id. § 672.002(6).

11. TEX. CIV. PRAC. & REM. CODE ANN. §§ 135.001-.018 (West 1986 & Supp. 1997).

12. *See id.* § 135.002(a).

13. *See id.* § 135.002(b).

14. *See id.* § 135.002(e)(1).

15. *See id.* § 135.002(c)(2).

16. Physicians often refer to the process used to withdraw artificial life support such as respirators as a "terminal wean." The patient is heavily medicated while the life-sustaining equipment is gradually shut down or the controlling life-sustaining medicine gradually withdrawn.

other's estate plan or an heir under a statute of descent and distribution of someone who has predeceased them, the timing of their death may very well determine whether the patient qualifies as a beneficiary or heir of this decedent under the state's Simultaneous Death Act.¹⁷

In general, the Simultaneous Death Act requires that an heir or beneficiary survive a decedent by 120 hours in order to share in the decedent's estate.¹⁸ This survival requirement simplifies matters in multiple death situations because it is easier to prove that one decedent did or did not survive another by 120 hours than to determine an exact order of deaths. Where an heir or a beneficiary has failed to survive a decedent by the required 120 hours, the heir or beneficiary is by statute deemed to have predeceased the decedent for the purpose of different property distributions arising by will, contract, or the law of descent and distribution.¹⁹ For the designated person or health care agent who is unaware of the application of the Simultaneous Death Act to the estate of the person for whom they are making health care decisions, the timing of this agent's decision to withdraw artificial life support may have significant intended or unintended estate consequences for the patient's estate and therefore the patient's beneficiaries and heirs.

A. The Case of Harold and Willa

Harold and Willa, widowers, marry when they are both sixty-five. Harold brings significant estate assets to this marriage that he acquired from a very successful business he owned and operated until his retirement. Willa taught public school and brings a modest teacher retirement and Social Security income to the marriage. Harold has one son, Sidney, who lives nearby. Willa's only daughter, Alice, lives out of state.

Shortly after their marriage, Harold and Willa execute testamentary wills. Harold names Willa as his primary beneficiary for the majority of his separate property and all of his interest in the community estate. He makes one specific bequest of \$20,000 to his wife's daughter, Alice, so long as his wife, Willa, survives him. Harold names his son, Sidney, as contingent beneficiary. In addition, Harold revises his beneficiary designation on his separate life insurance policy, which has a face value of \$250,000, naming Willa as his primary beneficiary

17. TEX. PROB. CODE ANN. § 47 (West 1980 & Supp. 1997).

18. *See id.*

19. *See id.* § 47(a), (c).

and Sidney as first alternate. Willa names Harold as her primary beneficiary for her separate and community property and designates Alice as contingent beneficiary.

Further, as permitted under the Texas Probate Code,²⁰ Harold and Willa add a survival provision to their wills to address the possibility of a simultaneous death. This provision in their wills reads as follows:

For all purposes of this will, if any beneficiary dies within five days (120 hours) after my death, such person shall be deemed to have predeceased me.

Harold and Willa also execute living wills and durable powers of attorney for health care. Sidney agrees to serve as the "designated person" on Harold and Willa's living wills and as their health care agent. Alice is listed as alternate agent.

Two years after their marriage Harold and Willa are involved in an automobile accident. Harold is killed instantly. Willa is hospitalized in critical condition, placed on life support, and is unable to breathe without the assistance of a respirator. Sidney is notified of the accident and presents a copy of Willa's living will and durable power of attorney for health care to her attending physician. Willa's living will contains the following directive:

If at anytime I should have an incurable condition caused by injury, disease, or illness certified to be a terminal condition by two physicians, and where the application of life-sustaining procedures would serve only to artificially prolong the moment of my death and where my attending physician determines that my death is imminent or will result within a relatively short time without application of life-sustaining procedures, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally.

Willa's injuries are so severe that within thirty-six hours of the accident she is considered to be terminally ill, and she is certified as a qualified patient by her attending physicians under the provisions of the Natural Death Act. Per Willa's medical directive, and at Sidney's direction as her designated person and health care agent, Willa's respirator support is slowly reduced, and she is permitted to die naturally. Willa dies within forty-eight hours of Harold.

20. See *id.* § 47(c), (f).

B. The Impact of the Timing of Willa's Death on the Distribution of Harold's Probate Assets

As Willa did not survive Harold for the required five days (120 hours), she is presumed, per the survival provision of Harold's will, to have predeceased him. This triggers the contingent beneficiary clause in his will. The impact on Harold's estate is that property that would have passed to Willa, as the primary beneficiary under Harold's will, now passes to Harold's son Sidney as the contingent beneficiary. Furthermore, the specific bequest of \$20,000 to Alice is also void, as it was a conditional gift dependent upon Willa's survival.

Had Sidney delayed his order to withdraw Willa's respirator support just three more days, the 120 hour survival provision of Harold's will would not have been triggered and perhaps Willa would have lived long enough to take under Harold's will. Furthermore, had Willa survived Harold, Alice, as the alternate beneficiary under Willa's will, would have then received not only her mother's estate, but also the substantial probate assets of her step-father's estate including his specific bequest to her of \$20,000.00.

C. The Impact of the Timing of Willa's Death on the Distribution of Harold's Nonprobate Assets

The timing of Willa's death has potential property distribution implications beyond Harold's probate estate because the Simultaneous Death Act applies equally to property involving nonprobate assets²¹ where the contract does not provide its own survival provision.²² Assuming that Harold's life insurance policy does not have its own survival provision, when Willa fails to survive Harold by 120 hours, her death triggers the statutory presumption that the insured, Harold, survived Willa as the primary beneficiary. This triggers Sidney's right to take the \$250,000 in proceeds as the alternate beneficiary, further reducing the potential assets that would flow to Alice under her mother's will.

21. *See id.* § 47(d), (e). These sections reach stocks, bonds, bank deposits and other intangible property, and all types of real and personal property, including community property with right of survivorship agreements. *See id.*

22. *See id.* § 47(f).

D. The Harsh Lesson of *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*

Although it may be argued that the survival provision in Harold and Willa's will operated exactly as they intended, it is equally likely that at the time they executed their advance directives they did not recognize that they were appointing an agent who, by having the authority to influence the time of their deaths, would also be in a position to alter the disposition of their probate and nonprobate assets. Fortunately for Harold and Willa, neither survived to witness firsthand the unintended result of the actual application of the survival language in their wills and the application of the Simultaneous Death Act to Harold's nonprobate assets. For those who do survive, the results can be emotionally and financially devastating, particularly if the person who has made the treatment decision is also a surviving spouse who suffers an unforeseen economic penalty as the result of a health care decision to terminate life-sustaining medical treatment. Such was the case in *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*²³ where a spouse ordered the withdrawal of her dying husband's life support, only to discover later that the timing of her decision reduced the amount of money to be distributed to her under her husband's retirement plan by fifty percent.

In that case, Warren Lorenzen, a sales manager and long-time employee of Sperry & Hutchinson Company, Inc., was eligible to retire on February 1, 1987, having turned sixty-five.²⁴ Because he was in the midst of managing a company project, Mr. Lorenzen complied with the company's request to postpone his retirement until July 1, 1987.²⁵

At the same time, Mr. Lorenzen decided that upon his retirement he would take his retirement benefits as a lump sum, rather than as a series of monthly payments for his life followed by monthly payments half as large to his wife for her life should she outlive him (the "fifty percent joint and survivor option," as it was called).²⁶ The taking of retirement benefits in a lump sum was an option expressly permitted by the company retirement plan, provided Mrs. Lorenzen executed a written consent form, which she did.²⁷ Furthermore, in order to re-

23. 896 F.2d 228 (7th Cir. 1990).

24. *See id.* at 234.

25. *See id.*

26. *See id.*

27. *See id.*

ceive any retirement benefit at all, lump sum or annuity, Mr. Lorenzen had to survive until the date of his retirement. Should he die before then, Mrs. Lorenzen would only be entitled to a much smaller preretirement benefit.²⁸

On June 15, 1987, two weeks before his extended retirement date, Mr. Lorenzen suffered cardiac arrest and was hospitalized in grave condition.²⁹ On June 27, he again suffered cardiac arrest and was plugged into life-support machinery.³⁰ His condition was believed to be hopeless, and his physicians advised Mrs. Lorenzen to request that the life support be disconnected.³¹ She did so, and Mr. Lorenzen died the same day, three days before he officially retired.³²

When the company advised Mrs. Lorenzen that she was only entitled to the preretirement death benefit of \$89,000 versus the \$192,000 she anticipated, Mrs. Lorenzen filed suit under the Employee Retirement Income Security Act of 1974 (ERISA).³³ She claimed that Sperry & Hutchinson's retirement plan, an ERISA plan, violated its fiduciary duties to her husband and herself, causing a loss of retirement benefits.³⁴ More specifically, Mrs. Lorenzen claimed that the plan did not adequately apprise her husband of the consequences of his electing the lump sum rather than annuity form of retirement benefits and his electing to keep on working rather than retire at the earliest possible opportunity.³⁵ Furthermore, Mrs. Lorenzen claimed that the plan should have advised Mr. Lorenzen more clearly than it did that if he postponed his retirement he was risking a net loss of benefits, because preretirement death benefits were lower than retirement benefits.³⁶

In a holding that the Seventh Circuit Court of Appeals would later characterize as based on the human appeal of Mrs. Lorenzen's case rather than the law, the district court granted summary judgment for Mrs. Lorenzen awarding her some \$192,000.³⁷ The Seventh Circuit reversed on appeal, holding that Mrs. Lorenzen had no contractual entitlement to retirement because her husband did not survive until

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. 29 U.S.C. §§ 1001-1461 (1994).

34. *See Lorenzen*, 896 F.2d at 230.

35. *See id.* at 235.

36. *See id.*

37. *See id.* at 234.

retirement as required by the company retirement plan.³⁸ This left Mrs. Lorenzen with the unfortunate knowledge that had she waited but seventy-two more hours to terminate her husband's life support, she would not have suffered a fifty percent loss of the retirement she and her husband had worked so hard to accumulate.

III. The Potential Conflict of Interest for Agents

The unfortunate result reached in the 1990 *Lorenzen* decision highlights the potential conflict of interest that may exist for individuals who find themselves in the position of making life-sustaining medical treatment decisions for another. In Mrs. Lorenzen's case, she was unaware of the conflict; therefore, she suffered the loss of a loved one as well as a significant financial penalty, possibly impacting her own survival. Had she known of the conflict, her decision-making process would have been made even more painful. She would have been faced with either allowing her husband to continue to receive inappropriate medical treatment or terminating his life support and suffering a significant financial loss in the bargain.

Although the conflict for Mrs. Lorenzen arose inadvertently by the seemingly innocent act of extending a retirement deadline, similar conflicts are unwittingly created when individuals appointed as health care agents use their health care decision-making authority for profit. Such a conflict was unintentionally created by Harold and Willa when they appointed Sidney as their health care agent. Although the timing of Sidney's decision to terminate his step-mother's life support was on its face innocent, it may not appear quite so innocent to Alice, when she learns she has suffered the loss of a sizeable bequest. Even under those circumstances where the exercise of an agent's decision-making authority does not financially benefit the agent, the agent's decision may invite third-party claims of interference with inheritance rights where the agent's decision causes another beneficiary or heir to suffer the loss of all or part of an expectancy.

If the potential for disinheritance by a medical directive surfaces before the withdrawal or withholding of life-sustaining medical treatment has been ordered, the agent may hesitate in carrying out his or her responsibilities, perhaps causing the patient needless suffering.

38. See *id.* at 236-37.

This delay could be particularly troublesome if the probate or nonprobate estate plan of the patient mandates a survival period longer than the statutory 120-hour minimum as a condition of inheritance. Rather than dealing with this conflict, the agent may choose to resign, leaving the decision-making authority in the hands of the treating physician. Should the same threats be directed to the treating physicians, the physicians may choose not to carry out the patient's instructions, knowing that they are not civilly or criminally liable for failing to effectuate a patient's directive.³⁹ A physician faced with this conflict will most likely continue to order full treatment until medical instructions are given by a court of competent jurisdiction.

IV. Correcting the Problem

The unfortunate loss of benefits suffered by Mrs. Lorenzen, and the possible animosity that Alice may feel when she learns of her disinheritance, can best be avoided by educating the public as to the relationship between health care directives, health care decisions to withhold or withdraw life support, and estate plans. The various professional groups that promote advance medical directives can educate the public by incorporating an appropriate warning into their literature to alert consumers of the potential effects of health care directives on estate plans. The legislature also could assist with this educational effort by making statutory changes requiring declarants and principals to read a warning statement alerting them to possible financial consequences to their estate plan that may occur as a result of an untimely decision to withhold or withdraw life-sustaining medical treatment. A warning statement such as this could easily be incorporated into the existing disclosure statement that is statutorily mandated under the current Durable Power of Attorney for Health Care Act,⁴⁰ and a similar disclosure statement could be added to the Natural Death Act.

The responsibility for public education rests also with the legal profession. As attorneys assist clients with the preparation of advance directives, they should explain the possible property-related consequences of implementing a directive. In addition, attorneys must in-

39. See TEX. HEALTH & SAFETY CODE ANN. § 671.016 (West 1992 & Supp. 1997); TEX. CIV. PRAC. & REM. CODE ANN. § 135.010(b), (c) (West 1986 & Supp. 1997).

40. TEX. CIV. PRAC. & REM. CODE ANN. §§ 135.014-.015 (West 1986 & Supp. 1997).

form clients that these consequences may be avoided by modifying the survival language in their wills. With the guidance of their attorneys, clients may wish to revise the survival provision in their wills in a number of ways. Some clients may simply choose to shorten the survival time in order to give their primary beneficiary the best chance possible to avoid disqualification as a beneficiary. Others may elect to add a paragraph to their will that states that any survival provision is null and void, if the death of a beneficiary is the result of instructions contained in a health care directive such that the condition set forth in the survival provision of the gifting party's will is triggered. Using Harold and Willa's will as an example, their survival paragraph might be modified as follows:

For all purposes of this will, if any beneficiary dies within five days (120 hours) after my death, such person shall be deemed to have predeceased me. However, if the time of death of a beneficiary of my estate is altered by the withholding or withdrawal of life-sustaining medical treatment per a medical directive this beneficiary has issued, and consequently he or she does not survive me by five days (120 hours), this beneficiary is not to be treated as having predeceased me.

For the testators who want to eliminate the temptation of self-dealing by their designated person or health care agent who they have also chosen to designate as a beneficiary, the following addition to their survival paragraph may provide the necessary relief:

For all purposes of this will, if any beneficiary dies within five days (120 hours) after my death, such person shall be deemed to have predeceased me. However, if a beneficiary of mine who has executed a medical directive fails to survive me by five days (120 hours), and if the agent on the beneficiary's medical directive is entitled to a share of my estate conditioned upon the failure of the beneficiary to survive me by five days (120 hours), the agent shall receive no greater share than their original share under my will. If the agent was not entitled to a share of my estate, he is to receive no share of my estate.

Although these proposed modifications to the survival language in a will are an important first step, alone they are insufficient to address the scope of the potential problem. To fully address the issue, declarants and principals should give instructions in their health care directives as to the course of action to be taken by their agent if the agent is faced with the prospect that the untimely removal of life support will cause the estate or family of the declarant or principal to incur the loss of a bequest or inheritance. To address this issue, an

individual may wish to add the following instruction to his or her health care directive:

If I am a beneficiary under a policy of life or accident insurance, or I am a beneficiary on a right of survivorship agreement, or I am a beneficiary under a will and the agent on my medical directive has personal knowledge of this fact, and if the withholding or withdrawal of life-sustaining treatment would shorten the period of my survival such that I would suffer the loss of a bequest, inheritance, or nonprobate asset, or cause my family, beneficiaries, or heirs to suffer a financial loss, then my health care agent is authorized in his full discretion to consider this factor when refusing or withdrawing life-sustaining treatment so long as any delay in carrying out my medical directive does not cause me further suffering.

Although it is relatively easy to revise survival language in a will and to incorporate warnings and instructions in both advance directives, the selection of an agent who does not have a potential conflict of interest is the more difficult issue to address.

At the present time there are no restrictions of any kind as to who can be appointed as a designated person under the Natural Death Act. The only statutory restrictions that come close to addressing the issue of a possible financial conflict of interest involve the selection of witnesses to the execution of this document.⁴¹ Under the Natural Death Act, the following persons cannot serve as a witness: any person related to the declarant by blood or marriage; any person entitled to any part of declarant's estate after the declarant's death under a will or codicil executed by the declarant or by operation of law; or a person who, at the time the directive is executed, has a claim against any part of the declarant's estate after the declarant's death.⁴²

The Durable Power of Attorney for Health Care Act restricts the same categories of individuals from witnessing.⁴³ The Durable Power of Attorney for Health Care Act, however, goes a step further by placing some restrictions on agent selection,⁴⁴ although none of the restrictions address the issue of an appointment that may create a financial

41. See TEX. HEALTH & SAFETY CODE ANN. § 672.003(c) (West 1992).

42. The attending physician, an employee of a health care facility in which the declarant is a patient if the employee is providing direct patient care to the declarant or is directly involved in the financial affairs of the facility, and patients in a health care facility in which the declarant is a patient are also excluded as possible witnesses.

43. See TEX. CIV. PRAC. & REM. CODE ANN. § 135.004(b) (West 1986 & Supp. 1997).

44. See *id.* § 135.003.

conflict of interest.⁴⁵ Excluded from appointment are: the principal's health care provider; an employee of the principal's health care provider, unless the person is a relative of the principal; the principal's residential care provider; or an employee of the principal's residential care provider, unless the person is a relative of the principal.⁴⁶ Other than these restrictions, an individual is free to appoint any person of his or her choosing as a health care agent.

As a practical matter, to statutorily exclude from appointment as designated person or health care agent those individuals who have an actual or possible interest in a declarant or principal's estate might unduly restrict the list of individuals who are willing to accept this most difficult of responsibilities. Furthermore, such a restriction might discourage individuals from completing advance directives, as it is highly likely that the person who is asked to serve as a designated person or health care agent is also a trusted loved one and therefore likely to be named as a beneficiary under the declarant's or principal's will.

Perhaps the most workable solution remains public education regarding the possible financial impact of the termination of life support on estate plans, the difficult choices designated persons and health care agents may be pressured to make, and the potential conflict of interest they may create for these agents. Once fully informed, each individual is then in a position to decide what course of action is in their own best interest.

V. Conclusion

Until a conscious effort is made to educate the public as to the relationship between end of life health care decision making and its possible impact on estate plans, the tragic circumstances of the *Lorzenen* case will be repeated and will likely increase in frequency as advance medical directives receive greater public acceptance and publicity. Like any other product, advance directives need to carry a warning label so that the general public is not lulled into believing that the use of this product is completely without risk. Until such time as this disclosure is incorporated into the statutory language of the advance directives, the burden of warning the public as to the pos-

45. *See id.*

46. *See id.* § 135.003(a)-(4).

sible impact on estate plans rests with the organizations that promote advance directives and the members of the bar who prepare these documents for their clients.